IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 244 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
AHER VEJANAND BHURA & 11 - Opponents

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Appearance :
MR KT DAVE, APP for Appellant.
HL PATEL ADVOCATES for Opponent(s) : 1, 6, 9, 11,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 03/08/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A. PUJ)

1. The State has filed this appeal under Section 378 (1) (3) of the Code of Criminal Procedure challenging the judgment and order dated 07.11.1985 passed by the learned Additional Sessions Judge, Jamnagar in Sessions Case No. 66 of 1984 acquitting all the 12 accused from the charge of offences punishable under Section 34, 147, 148, 149 and 302 of Indian Penal Code and Section 135 (1) of Bombay Police Act.

2. This Court vide its order dated 24.12.1986 granted leave to appeal and appeal was admitted only against six accused – respondents, namely, (1) Aher Vejanand Bhura, (2) Aher Naran Hardas, (3) Aher Natha Khima, (4) Aher Meraman Parbat, (5) Aher Karna Abha & (6) Aher Lakhman Hardas. The appeal against rest of the accused – respondents was dismissed.

3. During the pendency of appeal before this Court, two accused - respondents i.e. Aher Meraman Parbat and Aher Naran Hardas expired on 20.02.1995 and 28.10.1999 respectively. Their death certificates are produced on record by the learned Additional Public Prosecutor. Thus, the appeal against them was abated and the present appeal survives only against four accused – respondents, namely, (1) Aher Vejanand Bhura, (2) Aher Natha Khima, (3) Aher Karna Abha & (4) Aher Lakhman Hardas.

4. Initially, learned advocate Mr. K.B. Anandjiwala was appearing on behalf of the respondents – accused. However, he sought the permission of this Court to retire from the proceedings on the ground that he was not getting any co-operation and instructions from the respondents and he was not in a position to argue the matter. He has also conveyed to the Court that he had attempted

to inform the respondents by R.P.A.D. and some efforts have been made by him to establish the contact with them through lawyers who have defended them in the trial Court. This Court vide its order dated 17.04.2006 has permitted Mr. Anandjiwala to retire as an advocate appearing for respondents and for securing presence of the respondents, directed the registry to issue notices to them directing them to appear before the Court in person on the next date of hearing. The Court expressed its displeasure by stating that it is unfortunate that the persons once facing charges of the offences punishable under Section 302 read with other sections of Indian Penal Code have not cared to co-operate with the lawyer or the Court after lapse of even about 20 years in acquittal appeal filed by the State and the litigation is protracted on account of sheer negligence on the part of the respondents.

5. Subsequent to the aforesaid order and service of notice on the four respondents out of six, Mr. Vijay Patel, learned advocate appeared on their behalf of 01.05.2006 and stated that he had an instruction to appear on their behalf and all the four respondents are present in the Court. Two respondents accused have died.

6. In the above background of the matter, the appeal is finally heard qua the four respondents accused.

7. The case of the prosecution is that on 16.06.1984, deceased Nurmamad Taiyab was assaulted by the accused at around 13.30 hours near three patias of village Verad. Nurmamad Taiyab and Alimamad Taiyab had gone to Jamjodhpur to purchase seeds, but they had returned without purchasing seeds. They came at three patias of the village Verad, where they met Abu Osman with whom they had taken tea. All the accused persons assaulted them

and, therefore, all three persons ran away. The deceased and Alimamad Taiyab went towards the Vadi of Manilal Jinabhai of Verad, whereas Abu Osman moved towards village Shiva. The deceased and Alimamad were chased by accused persons and they had beaten the deceased in the field of Manilal Jinabhai, and Nurmamad Taiyab was done to death. The accused persons had also beaten Alimamad Taiyab who fell down. The accused persons went away. Alimamad and complainant, Abu Osman, went to the deceased. Abu Osman took Alimamad to three patias, and hired a rickshaw, and sent him to Dharagadh. Alimamad returned to scene of offence. Nurmamad Hamir came over there to whom Abu Osman narrated the incident. Then Nurmamad Hamir informed the police on telephone. P.S.I. Jadeja came immediately and recorded complaint of Abu Osman. Then investigation was commenced.

8. After completion of the investigation,

accused were charge-sheeted and the case was committed by the learned Judicial Magistrate First Class, Bhanvad vide his order in Criminal Case No. 451 of 1984 and on completion of the trial, all the 12 accused were acquitted from the charge of offences punishable under Section 34, 147, 148, 149 and 302 of Indian Penal Code and Section 135 (1) of Bombay Police Act, by the learned Additional Sessions Judge, Jamnagar vide his judgment and order dated 07.11.1985 passed in Sessions Case No. 66 of 1984.

9. Being aggrieved by the said judgment and order, the State has sought leave to appeal from this Court which was granted and appeal was admitted qua six respondents – accused on 24.12.1986 as indicated above.

10. Mr. K.T. Dave, learned Additional Public Prosecutor appearing for the State has taken us through the oral and documentary evidence which are on record and also assailed the

judgment and order dated 07.11.1985. He has submitted that the learned Trial Judge has erred in acquitting the respondents – accused though there are ample and cogent evidence to connect the accused with the crime. He has further submitted that the Learned Trial Judge has not considered the evidence led by prosecution in their true perspective. The prosecution has successfully established that the accused persons along with one Hardas Abha who expired during the course of trial formed an unlawful assembly and were armed with deadly weapons like axe, spear, stick, pipe, knife etc. This unlawful assembly or any member of it committed murder of deceased Nurmamad Taiyab. There was an eye-witness Ali Mamad Taiyab and there is no reason that he has falsely implicated the innocent persons allowing the real culprits to go scout free. Mr. Dave has further submitted that another eye-witness Abu Osman was also present at the scene of incident and the Learned Trial Judge has wrongly disbelieved

the said evidence. The prosecution witness Noor Mohmad was the first person to come to the scene of offence and he was informed about the incident by Mr. Abu Osman. He has further submitted that medical evidence fully supports the case of prosecution and the same was also not properly appreciated by the Learned Trial Judge. He has further submitted that the accused were armed with deadly weapons and they attacked the deceased with deliberate intention to cause his death. Mr. Dave has further submitted that all circumstantial evidence on record also support the case of the prosecution. He has, therefore, submitted that the judgment and order passed by the Learned Trial Judge is absolutely erroneous, improper and illegal and the same deserves to be quashed and set aside and the accused be punished in accordance with law.

11. Mr. Vijay Patel, learned advocate appearing for the respondents – accused, on the other

hand, supported the judgment and order passed by the Learned Trial Judge and submitted that no case is made out by State to take the different view in the matter. He has submitted that as per the prosecution case, there are two eye witnesses of the incident (i) PW5 – Exh. 30 – Abu Osman and (ii) PW 6 – Exh. 32 – Ali Mamad Taiyab. Both these eye-witnesses are disbelieved by the Learned Trial Judge and it was rightly done so for the following reasons :-

(i) PW5 – Abu Osman has stated in his deposition that he had gone towards Patiya of village Shiva for about 1200 feet. He has also stated that he witnessed the said incident. He has also stated that he has witnessed the said incident at a distance of 35 to 40 feet. He narrated the incident to one Noor Mahmmad Hamir – PW 13 when he met him at the first time at the scene of offence and in turn he gave telephonic message to Bhanvad Police Station whereas PW 13 – Noor

Mahmad, Exh. 41 says that PW 5 has not given any account of incident when he met him for the first time at the scene of offence and therefore, he did not tell anything about the accused to the police on telephone. Thus there are so many omissions and contradictions regarding the complaint which he has given to the Police. Abu Osman has not given the detailed accounts of the role attributed by the accused in the complaint, whereas, in his deposition before the Court he gave detailed accounts of the same. This shows that he has improved his version with an oblique motive against the accused. He has also said that he was there at the scene of offence till the dead body of the deceased was sent for postmortem and immediately thereafter he left the place. According to the relevant documentary evidence, postmortem and other notes / forms forwarding the dead body show that the dead body was removed at about 5-30 p.m. to 6-00 p.m. Whereas, as per the version of Investigating Officer, he was

there upto 8-00 p.m. at the scene of offence which shows that he wanted to conceal something or he did not give correct account of the incident. His conduct of not informing police immediately after the incident is also doubtful and, therefore, his evidence is not believable. His conduct of sending Ali Mohmmad to village Dharagadh is also unnatural because as per his deposition, PW 6 – Ali Mammad Taiyab was injured and he was bleeding and as per the Doctor's evidence, the injuries received by PW 6 could not have been bleeding injuries.

12. Mr. Patel has further submitted that the evidence of PW6 – Ali Mohmmad Taiyab, Exh. 32 is also not believable because after receiving the injuries, he did not go to Doctor or police station but he went to his village and informed his relatives and slept in his house. He, on the one hand, has said that in his field, the crop was sowed, at the other hand, he said that he along with

deceased had gone to Jamjodhpur to purchase seeds. They were to buy seeds by cash payment because as per his version, no merchant would give them on credit and therefore, his deceased brother had started with cash money and as per his detailed deposition, his brother spent money for paying fare of going to Jamjodhpur and coming back to three patiyas and made payment of tea which they had taken at three patiyas. As per the evidence on record, no money was found from his brother. According to him, his brother has not taken any breakfast in the morning and he accompanied him to Jamjodhpur and thereafter to three patiyas of village Verad. Thus, deceased had not taken any food till he was assaulted according to the deposition of PW 6 – Ali Mammad Taiyab – Exh. 32. Whereas PW 1 – Dr. Suresh P. Chandela said in his deposition that deceased had taken some food 3 ½ hours before his death. Thus the prosecution has failed to give an explanation as to when and with whom and where the

deceased had taken food. As per the deposition of PW 6, he was along with deceased since morning. This shows that his testimony was not at all believable. Mr. Patel has further submitted that Mr. Arjan Dosa Aher filed a complaint against PW 6 – Ali Mammad Taiyab, Haju @ Kesar Gul Mohmmad and Mahmmadsha Amadsha Fakir at about 1.00 p.m. and complaint was registered for the same. He has therefore submitted that there was no reason for Arjan Dosa Aher to falsely implicate Ali Mammad Taiyab in a complaint which was registered with Bhanvad Police Station before the present complaint was registered with Bhanvad police station. This clearly establishes that Ali Mammad Taiyab was at village Bhanvad at 1.00 p.m. and he was not with the deceased and it was also possible that he might have received injury in the scuffle at Bhanvad and he might have received small injury which as per the prosecution, he has received at three patiyas by the accused.

13. Considering all the above aspects of the matter, the Learned Trial Judge has rightly appreciated the evidence of these two eye-witnesses and come to the conclusion with regard to the evidence of Abu Osman that on perusal of his evidence and his cross-examination, he was of the opinion that Abu Osman is a witness who has not seen anything at all and he is simply shown as an eye-witness. Similar observation was made by the Learned Trial Judge with regard to another eye-witness, namely, Ali Mamad Taiyab that though this witness is an injured witness, his conduct since after the incident and the story related by him about the deceased and the witnesses having gone to village Jamjodhpur is not believable at all and notwithstanding the injuries on his person, the Learned Trial Judge was of the view that he is also a witness who is merely propped up and put by the prosecution.

14.Mr. Patel has further submitted that the Learned Trial Judge has discussed at length in his judgment with regard to other prosecution witnesses. PW 13 – Noor Mamad Hamir – Exh. 41 was not believed on the ground that he was not informed by Abu Osman about the names of assailants. Even PSI did not ask about the assailants. He did not know anything about the inquest panchnama and panchnama of scene of offence, eventhough he claimed to be there. PW 7 – Exh. 35 - Umedali Pirbhai turned hostile. PW 8 – Exh.36 - Hemantlal Laxmanbhai did not identify the accused. PW 9 – Exh. 37 – Vallabh Parshottam said that he has seen only one person chased by five to seven persons. However, he did not identify the accused. PW 10 – Exh. 38 – Jusab Sidi said that Hardas Patel of Manpar and others had hired his rickshaw and they got down at three patiyas. However, he did not identify the accused. PW 11 – Exh. 39 – Manilal Zinabhai said that he saw one person chased by 7 to 8 persons. However, he did not

identify the accused. PW 12 – Exh. 40 – Haju @ Kesar Gulmamad said that he alone had gone to Bhanvad and Alimamad Taiyab was not with him, but record say otherwise. PW 14 – Exh. 44 - Temubha Ramsinh witness to the inquest panchnama turned hostile. PW 15 – Exh. 45 – Alarakha Hasam, the rickshaw driver, whose rickshaw was hired by Hardas Patel and others and he felt that quarrel was likely to take place, he stopped his rickshaw, thereafter, those persons started walking towards village Verad, whereas in his police statement recorded after five days he said that those persons boarded in a truck. PW 16 – Exh. 46 – Ismail Osman is uncle of Alimamad Taiyab, before whom Alimamad declared the story. Alimamad's evidence was not believed and no reliance was placed on it. PW 18 – Exh. 49 – Dayasagar Devgar and PW 19 – Exh. 64 Karmali Vira were hostile panchas to panchnama of discovery of knife from accused Lakha Hardas under Section 27 of Evidence Act. He did not identify the accused at whose instance, the

knife was discovered. PW 23 – Exh. 71 – PSI Jadeja and PW 24 – Exh. 74 CPI J.K. Patel had carried out investigation. PW 23 recorded complaint and carried out inquest panchnama as well as panchnama of scene of offence immediately. But he recorded statements of witnesses much later. Mr. Patel has, therefore, submitted that the Learned Trial Judge has rightly observed in his judgment that in view of the long standing enmity between the accused side and the deceased side and it is quite likely that because the deceased did meet with an unnatural death probably at the place mentioned by the prosecution, the accused side was suspected of commission of such offence and were got involved.

15. Considering all the aforesaid submissions, Mr. Patel has emphatically urged that the Learned Trial Judge has rightly acquitted all the accused and the said order should not be disturbed at this stage especially when one

of the accused expired during trial and the appeal was admitted qua six accused only and out of them, two have already expired as submitted earlier. He has, therefore, submitted that since there was no clinching evidence against any of them, the appeal filed by State deserves to be dismissed.

16. We have heard at length the learned Additional Public Prosecutor Mr. Dave and Mr. Vijay Patel, learned advocate appearing for the four respondents – accused qua whom the appeal survives. We have also gone through the impugned judgment and order passed by the Learned Trial Judge. We have perused oral as well as documentary evidence which have come on record. The whole emphasis of Mr. Dave is on the evidence of two eye-witnesses out of whom one is injured eye-witness. We are in conformity with the reasons given by the Learned Trial Judge while disbelieving the evidence of these two eye-witnesses. As far as evidence of Abu Osman is concerned, we

found substance in the reasoning of the Learned Trial Judge as well as in the submissions made by Mr. Patel that this witness himself did not inform the police. He left it to Noor Mahmmad. He immediately sent away Alimamad Taiyab to Dharagadh. Either Alimamad Taiyab could have been sent to Bhanvad, which is at short distance from the place of offence or he should have been sent him to the hospital but he was sent to village Dharagadh. Similarly, another eye-witness who was injured , namely, Alimamad Taiyab was also rightly disbelieved in as much as he did not state correctly about his age. He did not go to Bhanvad police station. He did not go to any other police station. He went to his village Dharagadh. He did not go to hospital until he was sent by police. There was long standing enmity between two groups. He was an accused in an offence. He showed his ignorance about the same. He identified some of the witnesses. He could have identified all. They are all known to

each other as they belong to same village. There was an explanation that he had gone to Bhanvad and he was involved in an offence on the same day. He could not have gone to purchase seeds from Jamjodhpur as Bhanvad is nearer place. No cash was found from deceased despite the fact that seeds were to be purchased by cash. As per medical evidence, he took meal before about 2 ½ to 3 ½ hours of his death. Alimamad said that he did not take meals at all. No relatives from Dharagadh had come to scene of offence after he reached his village. Nobody said that Taiyab Mamad and Abdulla reached the scene of offence immediately. Alimamad reached Dharagadh and slept, which appears to be very strange. Injuries received by him were also not serious to show that it was as a result of fight to finish the witness. In police statement, he involved all witnesses. In Court, he involved only six witnesses. On the one hand, he said that he became unconscious and on the other hand, he had said that he

had seen the incident which appears to be very contradictory. Because of a long rivalry between two groups, the complainant's group involved the accused merely on suspicion.

17. Since the evidence of two eye-witnesses was not believable and other evidence could not persuade us to link the accused with the crime, we are not inclined to interfere in the finding recorded and conclusion arrived at by the Learned Trial Judge for acquitting the accused. We are of the view that there is no second view possible in light of the discussion made herein above. The reasons recorded by the learned Trial Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas v. State of Haryana, reported in (2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed

merely because the other view is possible.

18. From the foregoing fact discussion, we are of the view that the prosecution has not satisfactorily proved the case against the respondents – accused. The Learned Trial Judge has come to just and proper conclusion after appreciation of oral as well as documentary evidence. The prosecution has failed to establish the link between the involvement of the accused and commission of crime and on these facts, it is difficult to convict the accused from the alleged charge of offences. The respondents – accused are, therefore, rightly acquitted by the Learned Trial Judge.

19. In view of the ratio of the above referred decision and discussion made herein above, we find no illegality or perversity in the judgment and order passed by the Learned Trial Judge. Hence, the appeal stands dismissed.

[C.K. BUCH, J.] [K.A. PUJ, J.]

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